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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARGARET HARRIS,

Plaintiff and Appellant,

v.

CITY OF SAN JOSE, et al.,

Defendants and Respondents.

H034078

(Santa Clara County  
Super. Ct. No. CV105480)

**I. INTRODUCTION**

Appellant Margaret Harris, a self-represented litigant, brought an action against her landlord, Richard Yoza,<sup>1</sup> as well as respondents City of San Jose (City) and Wells Fargo Bank, N.A. (Wells Fargo), alleging many instances of wrongdoing by all defendants. The trial court sustained defendants' demurrers to the original complaint, the first amended complaint, and the second amended complaint with leave to amend. The trial court sustained defendants' demurrers to the third amended complaint without leave to amend, finding that Harris had failed to state a cause of action as to either defendant and that the defects in the complaint could not be cured by further amendment. Thereafter, judgments of dismissal were entered in favor of the City and Wells Fargo.

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<sup>1</sup> According to the parties, defendant Richard Yoza has not appeared in the action.

On appeal, Harris argues that her claims are meritorious and deserve a hearing. She also argues that her failure to properly comply with the claim presentation requirement for an action against a public entity (Gov. Code, § 945.4)<sup>2</sup> should not bar her claims against the City. Having performed an independent review of the third amended complaint, for the reasons stated below we conclude that the trial court did not err in sustaining defendants' demurrers without leave to amend and therefore we will affirm the judgments.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### ***A. The First Three Rounds of Demurrers***

According to defendants, Harris filed her original complaint on February 11, 2008.<sup>3</sup> The trial court sustained the demurrers of the City and Wells Fargo with leave to amend. Harris filed a first amended complaint on May 28, 2008, to which Wells Fargo apparently demurred.<sup>4</sup> The City states that Wells Fargo's demurrer was sustained with leave to amend on June 3, 2008. The order sustaining the demurrer to the first amended complaint was not included in the record on appeal, and it is not clear in the record whether the City also filed a demurrer to the first amended complaint.

Harris filed a second amended complaint on June 11, 2008,<sup>5</sup> according to defendants, and the trial court sustained their demurrers to the second amended complaint with leave to amend on September 5, 2008. The court sustained the City's demurrer on

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<sup>2</sup> All statutory references hereafter are to the Government Code unless otherwise indicated.

<sup>3</sup> A copy of the original complaint was not included in the record on appeal.

<sup>4</sup> Neither the first amended complaint, Wells Fargo's demurrer to the first amended complaint, nor the order sustaining the demurrer to the first amended complaint with leave to amend were included in the record on appeal.

<sup>5</sup> The second amended complaint and the demurrers thereto were also omitted from the record on appeal.

the ground that the second amended complaint failed to allege either that Harris had complied with the claim presentation requirement of the California Tort Claims Act, as set forth in section 945.4,<sup>6</sup> or that she was excused from compliance. The court also sustained the City's demurrer on the ground of uncertainty. Wells Fargo's demurrer to the second amended complaint was sustained on the ground that the complaint failed to state a cause of action against Wells Fargo.

***B. The Third Amended Complaint***

The third amended complaint was filed on September 30, 2008. The 37-page complaint includes a first cause of action for fraud against Harris's landlord, defendant Richard Yoza. We understand Harris to assert that Yoza's wrongdoing included, among other things, refusing to fix the heat in her apartment, failing to make other necessary repairs to the property, renting the other two apartments in the building to unsuitable tenants, causing a decline in her home tutoring business, and wrongfully terminating her tenancy.

The third amended complaint also includes a second cause of action against defendant Wells Fargo, in which Harris generally alleges that Wells Fargo has engaged in unlawful lending practices. Specifically, Harris asserts that although Wells Fargo's loan enabled Yoza to purchase the apartment building, Wells Fargo has failed in its obligation as the mortgagor to ensure that Yoza maintained the apartments in a livable condition. She also asserts that Wells Fargo allowed Yoza to falsely claim that he lived in one of the apartments in order to obtain a "significant financial break." Harris further alleges that

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<sup>6</sup> Section 945.4 provides, "Except as provided in Sections 946.4 and 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division."

Wells Fargo wrongfully cashed stale checks that Harris had written to Yoza on her Wells Fargo checking account.

The third cause of action alleges that defendant City diminished her citizenship because she received a notice terminating her tenancy in Yoza's apartment building after she spoke publicly against a building project. She also alleges that the City has acted wrongfully against renters in a number of ways, including violating their voting rights and failing to ensure the habitability of rental dwellings by adequate code enforcement. Additionally, Harris claims that the City has failed to send notification of public hearings on building projects to non-landowners.

The third amended complaint seeks declaratory relief and compensatory and punitive damages.

### ***C. The City's Demurrer to the Third Amended Complaint***

In its points and authorities in support of its demurrer to the third amended complaint, City argued that Harris again failed to allege either that she had satisfied the claim presentation requirement of section 945.4 or that she was excused from compliance. City also argued that the third amended complaint was fatally uncertain, in violation of Code of Civil Procedure section 430.10, subdivision (f),<sup>7</sup> because it was impossible "for the City to determine the relevance of any particular allegation or prepare any substantive response or defense on the merits without an unreasonable amount of interpretation, guesswork and assumption." Additionally, the City noted that the third amended complaint was "identical in all material respects" to the original complaint and the second amended complaint.

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<sup>7</sup> Section 430.10, subdivision (f) provides, "The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: [¶] . . . [¶] The pleading is uncertain. As used in this subdivision, 'uncertain' includes ambiguous and unintelligible."

#### ***D. Wells Fargo's Demurrer to the Third Amended Complaint***

Wells Fargo argued in its points and authorities in support of its demurrer to the third amended complaint that, to the extent the complaint could be understood to make various claims against Wells Fargo, all of the claims failed to state a cause of action. First, the claim that Wells Fargo's lending practices had aided and abetted the fraud of Yoza, Harris's landlord, failed because there was no allegation that Wells Fargo had knowledge of the fraud. Second, the claim that Wells Fargo had conspired with Yoza to defraud Harris failed because she did not allege that Wells Fargo and Yoza had an agreement to defraud her and did not plead her fraud claim with the requisite particularity.

Also, assuming that the third amended complaint could be understood to include a claim that Wells Fargo was liable to Harris for unlawful, unfair or fraudulent business practices, Wells Fargo argued that the complaint lacked any allegations showing a violation of the unfair competition law, as set forth in Business and Professions Code section 17200. Wells Fargo further noted that Harris's allegation that Wells Fargo had cashed her stale checks to Yoza failed to state a cause of action because cashing stale checks is allowed under California Uniform Commercial Code section 4404. Finally, Wells Fargo argued that the implication in the third amended complaint that Wells Fargo owed a duty to Harris as a result of making a mortgage loan to Yoza could not form the basis for a cause of action because Wells Fargo owed no duty to her as Yoza's tenant as a matter of law.

Wells Fargo further contended that leave to amend the third amended complaint should not be granted because Harris had not shown that she could amend the complaint to state a viable cause of action against Wells Fargo.

### ***E. The Trial Court's Order***

On February 5, 2009, the trial court entered its order sustaining the demurrers to the third amended complaint without leave to amend.<sup>8</sup> The court sustained the City's demurrer without leave to amend on the ground that Harris had failed to plead either compliance with the claim presentation requirement of section 945.4 or an excuse from compliance despite several opportunities to do so. The court also sustained the City's demurrer on the ground of uncertainty without leave to amend. A judgment of dismissal in favor of the City was entered on February 18, 2009.

As to Wells Fargo, the trial court sustained its demurrer without leave to amend on the ground that the complaint failed to state a claim upon which relief could be granted, finding that the third amended complaint was "devoid of allegations showing that the lending practices of Wells Fargo directed the fraud of Defendant Richard Yoza." A judgment of dismissal in favor of Wells Fargo was entered on February 18, 2009.

Harris subsequently filed a timely notice of appeal from the judgments.

## **III. DISCUSSION**

### ***A. Standard of Review***

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) However, we do not assume the truth of " " "contentions, deductions or conclusions of fact or law." ' ' ' (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) We then exercise our own independent judgment as to whether the

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<sup>8</sup> The record on appeal lacks the reporter's transcript for the February 5, 2009 hearing on the demurrers.

complaint states a cause of action as a matter of law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) Where the trial court denied leave to amend the complaint following the sustaining of a demurrer, we review the court's determination that no amendment could cure the defect in the complaint for abuse of discretion. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081.)

In performing our independent review of the adequacy of the third amended complaint, we are mindful that Harris, as a self-represented litigant, is not entitled to leniency. "Under the law, a party may choose to act as his or her own attorney. [Citations.] '[S]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]' [Citation.]" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.) Thus, a self-represented litigant is not entitled to lenient treatment. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.)

We will discuss in turn each of Harris's appellate challenges to the judgments of dismissal after the order sustaining without leave to amend the demurrers of the City and Wells Fargo to the third amended complaint.

### **B. *The City's Demurrer***

The trial court sustained without leave to amend the City's demurrer to the third amended complaint on two grounds: (1) failure to allege either compliance or an excuse for noncompliance with the claim presentation requirement of section 945.4; and (2) uncertainty.

On appeal, Harris makes assertions that were not included in the third amended complaint: that she attempted to use an " 'incident form' " that she obtained from "city hall" but the form was "not appropriate or possible for use in a matter of this type." She also asserts in her opening brief that she satisfied the claim presentation requirement by making the city attorney's office, the mayor's office, and the planning department "aware of her problems and her intention of taking the city to court if they were not resolved."

The City responds that the third amended complaint did not plead either compliance with the claim presentation requirement or an excuse from compliance, despite being expressly required to do so by the trial court's order of September 5, 2008, sustaining the City's demurrers to the second amended complaint. The September 5, 2008 order states, "Plaintiff must plead facts in her complaint that shows compliance with the Government Tort Claims Act or facts showing that she is excused from compliance with the Act."

We find the failure to allege either compliance or an excuse for noncompliance with the claim presentation requirement of section 945.4 to constitute a fatal defect in the third amended complaint, and therefore we will address that ground for demurrer first.

The California Tort Claims Act (§ 810 et seq.) governs all claims for money or damages against public entities and their employees. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 980.) The California Supreme Court has instructed that, with certain exceptions not relevant here, "[s]ection 905 requires the presentation of 'all claims for money or damages against local public entities' . . . . Claims for personal injury and property damage must be presented within six months after accrual; all other claims must be presented within a year. (§ 911.2.) '[N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity and has been acted upon . . . or has been deemed to have been rejected . . . .' (§ 945.4.) 'Thus, under these statutes, failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity.' [Citation.]" (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 737.)

The California Supreme Court has therefore ruled that "a plaintiff must allege facts demonstrating or excusing compliance with the claim presentation requirement. Otherwise his [or her] complaint is subject to a general demurrer for failure to state facts



sufficient to constitute a cause of action.” (*State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1243.)

We understand Harris to contend on appeal that she substantially complied with the claim presentation requirement of section 945.4. We apply two tests to determine substantial compliance: “Is there *some* compliance with *all* of the statutory requirements; and, if so, is this compliance sufficient to constitute *substantial* compliance?” (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 456-457.) Here, Harris does not allege in her third amended complaint that she sufficiently complied with any of the statutory requirements.

Harris argues instead that she satisfied the claim presentation requirement by making the City aware of her claims and her intent to bring a lawsuit against the City if her problems were not resolved. This argument lacks merit. Even assuming that Harris could amend her third amended complaint to include these allegations, they would not be sufficient to cure the defect in the complaint. As this court has previously observed, “ ‘[i]t is well-settled that claims statutes must be satisfied even in the face of the public entity’s actual knowledge of the circumstances surrounding the claim. Such knowledge--standing alone--constitutes neither substantial compliance nor basis for estoppel. [Citations.]’ [Citations.]” (*Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 713.)

Finally, to the extent that Harris argues in the alternative that she need not comply with the claim presentation requirement of section 945.4 because it violates the United States Constitution, we reject that contention. The California Supreme Court has determined that “requiring plaintiffs to allege facts sufficient to demonstrate or excuse compliance [with the claim presentation requirement] does not deprive them of their due process rights or unfairly bar just claims.” (*State of California v. Superior Court (Bodde)*, *supra*, 32 Cal.4th at p. 1245.) The claim presentation requirement also does not deprive the plaintiff of equal protection under the United States Constitution. (*Tammen*

*v. County of San Diego* (1967) 66 Cal.2d 468, 481; *Tsingaris v. State of California* (1979) 91 Cal.App.3d 312, 315; *Roberts v. State of California* (1974) 39 Cal.App.3d 844, 849.)

We therefore conclude that the third amended complaint fails to adequately allege either compliance or an excuse for noncompliance with the claim presentation requirement of section 945.4. The trial court therefore properly sustained the City's demurrer on the ground that the complaint failed to state a cause of action against the City. (*State of California v. Superior Court (Bodde)*, *supra*, 32 Cal.4th at p. 1243.)

Finally, we consider whether the trial court properly sustained the City's demurrer without leave to amend. "The issue of leave to amend is always open on appeal, even if not raised by the plaintiff. [Citation.]" (*City of Stockton v. Superior Court*, *supra*, 42 Cal.4th at p. 746.) The standard of review is abuse of discretion. "As a general rule, if there is a reasonable possibility the defect in the complaint could be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.) In the present case, because Harris has had three opportunities to amend her complaint to allege either compliance or an excuse for noncompliance with the claims presentation requirement and has not shown a reasonable possibility that she could cure the defect by amendment, we further conclude that the trial court did not abuse its discretion in sustaining the City's demurrer to the third amended complaint without leave to amend.

Since we have determined that Harris's action against the City is barred due to her failure to allege either compliance or an excuse for noncompliance with the claim presentation requirement of section 945.4, we need not address the City's additional ground for demurrer: that the third amended complaint is fatally uncertain under Code of Civil Procedure section 430.10, subdivision (f).

### ***C. Wells Fargo's Demurrer***

The trial court sustained Wells Fargo's demurrer to the third amended complaint without leave to amend on the ground that the complaint failed to state a claim upon which relief could be granted, finding that the third amended complaint was "devoid of allegations showing that the lending practices of Wells Fargo directed the fraud of Defendant Richard Yoza."

We understand Harris to contend on appeal that the trial court erred because she properly alleged three theories of liability against Wells Fargo. First, Harris argues that Wells Fargo is liable to her because Wells Fargo gave her landlord, Richard Yoza, a very favorable mortgage on the apartment building where she resides as a result of his fraudulent claim that he lived in one of the apartments. Second, we understand Harris to contend that Wells Fargo, as her landlord's mortgage lender, is liable to her for the poor condition of her apartment and for unspecified violations of her constitutional rights. Finally, Harris asserts that Wells Fargo is liable to her for cashing checks that she wrote to Yoza on her Wells Fargo checking account that were stale because he had failed to cash them for more than six months. We will address each theory of liability in turn.

To the extent that the cause of action against Wells Fargo is based upon the claim that it wrongfully made a favorable mortgage loan to Yoza based on his fraudulent claim that he lived in the apartment building, we see no basis for a valid cause of action. The elements of fraud are: (1) a misrepresentation of a material fact or concealment of a fact that defendant is under a duty to disclose, (2) knowledge of the falsity, (3) intent to defraud plaintiff and induce reliance, (4) justifiable reliance by plaintiff, and (5) resulting damage. (*Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 93.) As Wells Fargo points out, Yoza's alleged misrepresentation was made to Wells Fargo, not to Harris. Also, Harris has not alleged that Wells Fargo intended to defraud her or to induce her reliance. Therefore, to the extent Harris's claim against Wells Fargo rests on a fraud theory of liability, the third amended complaint fails to state a cause of action.

Harris's second claim, that Wells Fargo is liable for the poor condition of her apartment, is also insufficient to state a cause of action against Wells Fargo because she has not and cannot allege that Wells Fargo is her landlord. The general rule is that "[a] landlord owes a duty of care to a tenant to provide and maintain safe conditions on the leased premises. [Citation.]" (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134.) In *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, the California Supreme Court stated: "The implied warranty of habitability . . . gives a tenant a reasonable expectation that the landlord has inspected the rental dwelling and corrected any defects disclosed by that inspection that would render the dwelling uninhabitable. The tenant further reasonably can expect that the landlord will maintain the property in a habitable condition by repairing promptly any conditions, of which the landlord has actual or constructive notice, that arise during the tenancy and render the dwelling uninhabitable." (*Id.* at pp. 1205-1206.)

Moreover, while Harris alleges that Wells Fargo's mortgage agreement with Yoza required him to maintain the apartments in a "livable condition," that allegation does not support a valid cause of action against Wells Fargo. " 'A third party should not be permitted to enforce covenants made not for his [or her] benefit, but rather for others. He [or she] is not a contracting party; his [or her] right to performance is predicated on the contracting parties' intent to benefit him [or her]. [Citations.] As to any provision made not for his [or her] benefit but for the benefit of the contracting parties or for other third parties, he [or she] becomes an intermeddler.' [Citation.]" (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 680.) We find that Harris has not and cannot allege that the mortgage agreement between Wells Fargo and Yoza was intended to benefit her as a tenant of the mortgaged apartment building.

Harris's third theory of liability against Wells Fargo is that it is liable for cashing checks that she wrote to Yoza on her Wells Fargo checking account that were stale because he had failed to cash them for more than six months. This allegation is also

insufficient to state a cause of action against Wells Fargo. As Wells Fargo correctly notes, California Uniform Commercial Code section 4404 expressly provides that a bank may cash stale checks: “A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six months after its date, but it may charge its customer’s account for a payment made thereafter in good faith.”

Finally, to the extent Harris’s claim against Wells Fargo is based on alleged violations of her constitutional rights, we also find that she has failed to state a cause of action. The general rule is that an allegation of state action is required for a valid constitutional claim. “ ‘[B]y exempting private action from the reach of the Constitution’s prohibitions, [the state action limitation] stops the Constitution short of preempting individual liberty--of denying to individuals the freedom to make certain choices . . . . Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution’s demands.’ [Citation.]” (*Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1030; *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 365-366 [no state action by bank where allegations involved the private decision of a private business operating on private property].)

Thus, we agree with the trial court that the third amended complaint fails to state a cause of action against Wells Fargo under any of the theories of liability argued by Harris. We also find that the trial court did not abuse its discretion in sustaining Wells Fargo’s demurrer to the third amended complaint without leave to amend. “[W]here the nature of the plaintiff’s claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result.” (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra*, 68 Cal.App.4th at pp. 459-460.)

For these reasons, we will affirm the judgments of dismissal after the order sustaining without leave to amend the demurrers of the City and Wells Fargo to the third amended complaint.

#### **IV. DISPOSITION**

The judgments of dismissal after the order of February 5, 2009, sustaining without leave to amend the demurrers of respondents City of San Jose and Wells Fargo Bank, NA to the third amended complaint are affirmed. Costs on appeal are awarded to respondents.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MCADAMS, J.

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DUFFY, J.